FILED
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HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 423

MINNESOTA MINING & MANUFACTURING COMPANY, A DELAWARE CORPORATION,
Petitioner,

vs.

GATEWAY DECORATORS, INC., AN ILLINOIS CORPORATION
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Minnesota Mining & Manufacturing Company, a Delaware corporation, prays that a writ of certiorari issue to review the order and judgment of the Court of Appeals for the Fifth Circuit, (R. 40), entered in this cause.

Opinions Below

No opinion was rendered in the Court of Appeals. Petitioner's case was disposed of upon *ex parte* order, (R. 40), without comment.

Jurisdiction

Judgment was entered on September 15, 1954, by the United States Court of Appeals for the Fifth Circuit. The jurisdiction of this Court is invoked under Title 28, U.S.C., Sec. 1254, and Title 28, U.S.C., Sec. 1651 (a).*

Questions Presented

1. Does the mere solicitation of mercantile business in the State of Florida, the orders to be approved in the St. Paul, Minnesota, office of the foreign corporation seller and the goods to be shipped thereon in interstate commerce into the State of Florida by common carrier, constitute doing business in this state so as to bring the nonqualified foreign corporation under the operation of Sec. 47.17, Florida Statutes, rendering it subject to the jurisdiction of the Courts of Florida and subject to the service of process upon it, for purposes of local jurisdiction, through one of its traveling salesmen?

2. Did the Court of Appeals err in failing to follow, in the case at bar, the formula of the Supreme Court laid down in *International Shoe Co.* v. *State of Washington,* (1945), 326 U.S. 310, 66 S. Ct. 154, 90 L. ed. 95, 161 A.L.R. 1057, in denying Petitioner writs of mandamus and prohibition applied for as an expeditious and effective means of confining the District Court to a lawful exercise of its jurisdiction?

Statutes Involved

The governing statute of Florida, Florida Statutes Annotated, Section 47.17, provides that if a foreign corporation shall have none of the following officers or agents in the state, viz., president, vice president, or other head of the corporation, or cashier, treasurer, secretary or general

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* (See *Ex Parte Quirin,* 317 U.S. 1, 63 S. Ct. 2, 87 L. ed. 3, and *House, Petitioner,* v. *Mayo,* 324 U.S. 42-49, 44, 65 S. Ct. 517, 89 L. ed 739.)

manager, any director or officer or business agent, resident in the state, then

> "service may be had upon any agent transacting business for it in the state."

The provisions of the Federal Rules of Civil Procedure pertaining to service of process on the questions raised are found in subsections (d) (3) and (d) (7) of Rule 4.

Statement

Petitioner, a St. Paul, Minnesota, manufacturer incorporated under Delaware law, was sued in the State Court in Florida by Gateway Decorators, Inc., an Illinois corporation having its principal place of business in Chicago, in that state, in regard to goods ordered by mail and through traveling salesmen and shipped into Florida to the buyer, in interstate commerce, over common carrier lines.

A special appearance, (R. 17), was entered in the State Court and the action was duly removed to the United States District Court for the Southern District of Florida, Miami Division, on the ground of diversity.

The complaint in the case charged petitioner with a variety of unrestrained wrongdoing, and set forth fancied and unproven acts of commerce, intrastate in character.

Process purportedly had been served on defendant through one of its traveling salesmen, under Sec. 47.17, Florida Statutes. Petitioner, after removal, (R. 18), moved to quash the return of service of process on the ground that it had transacted no business in Florida except in interstate commerce, by mail orders sent in and through occasional orders placed with its traveling salesmen, for acceptance at St. Paul, Minnesota.

Actually, no issues of fact were presented at the hearing on the Motion to Quash Service and To Dismiss, (R. 18).

Gateway Decorators, Inc., offered no evidence whatever in support of its jurisdictional claims. Evidence, contra, was accepted by the District Judge in affidavit form. The affidavits which had been submitted in support of the motion were alone received in evidence. They were by Marshall E. Dunn, the traveling salesman served, (R. 22); by Clarence M. King, (R. 24); and Durand W. Maher, (R. 27). The facts set forth in these affidavits were in no way controverted or denied.

As will be seen, the traveling salesman, Marshall E. Dunn, happened to live in Coral Gables, Florida, *at the time of service of process,* and had at times casually received orders, for transmittal by mail, to his employer, but had no authority otherwise, and was in no sense a business agent of his absent, non-entered, foreign corporation employer, the Petitioner.

Notwithstanding this Court's decision in *Peoples Tobacco Co.* v. *American Tobacco Co.,* 246 U.S. 79, 38 S. Ct. 233, 62 L. ed. 587, holding that neither the advertisement by a foreign corporation of its wares in a state, nor the solicitation of orders there through agents having no authority beyond solicitation, amounts to the doing of business therein which will subject it to the local jurisdiction for the purpose of service of process upon it, as was precisely true of the case presented, the District Judge denied Petitioner's Motion to Quash and To Dismiss, (R. 18), and undertook to assume jurisdiction over the person of Petitioner and of the cause of action.

Thereupon, seeking to oust the jurisdiction wrongfully assumed, Petitioner duly presented to the United States Court of Appeals for the Fifth Circuit its duly verified Petition for a Writ of Mandamus or a Writ of Prohibition, and Motion for Leave to file the same, but leave was denied and relief refused, (R. 40), by order and judgment entered on September 15, 1954.

The case at bar is distinguishable from *International Harvester Co.* v. *Kentucky,* 234 U. S. 579, 34 S. Ct. 944, 58 L. ed. 1479, because in that case there was a continuous course of business in the solicitation of orders within the state, plus authority vested in or entrusted to the solicitation agents to receive payment for the goods sold in money, or by drafts, and to accept promissory notes payable at Kentucy banks; and these elements of local business are lacking in our present case.

Specifications of Errors

The Court of Appeals erred:

1. In denying Petitioner's Motion for leave to file its Petition for a Writ of Mandamus or a Writ of Prohibition, directed against the District Court, in the pending case of *Gateway Decorators, Inc., an Illinois corporation,* v. *Minnesota Mining & Manufacturing Co., a Delaware corporation.*
2. In refusing to issue alternative Writs of Prohibition and Mandamus in said case as a predicate for Peremptory Writs, to which Petitioner would be entitled.
3. In affirming, in effect, the wrongful assumption of jurisdiction over the person of Petitioner and of the case by the District Court, leaving Petitioner without a remedy otherwise.

Reasons for Granting the Writ

The construction placed by the Fifth Circuit Court of Appeals on the term "doing business" in its decision in the case of *Polizzi* v. *Cowles Magazines, Inc.,* 197 F. 2d 74, was not the factor that brought about the reversal of that case in *Polizzi* v. *Cowles,* 345 U.S. 663, 73 S.Ct. 900, 97 L.ed. 1331. While its construction of the term and its application thereof, therein, has in some quarters been alluded to as "narrow" and "rigid", the majority did not so char-

acterize it, and the Court did not rule on the question of whether the corporation, Cowles Magazines, Inc., was doing business in Florida. The reversal was based upon a misapplication of the general venue statute, 28 U.S.C. 1391, rather than the applicable statute relating to removed cases, 28 U.S.C. 1441(a).

Nevertheless, reacting to the reversal, the Court of Appeals has gone to the other extreme and in the case now being presented has held in effect that mere solicitation of business in interstate commerce is doing business within the state into which goods are shipped even though the shipper, a non-resident corporation, is otherwise absent. This determination has been made with respect to service of process upon a traveling salesman and as to jurisdiction over the person of the absent corporation and non-admitted, Petitioner. The venue statutes, 28 U.S.C. 1391, and 28 U.S.C. 1441(a), are not presently involved.

Until recently, it was considered settled by numerous decisions that mere solicitation and procurement of orders in the state by traveling representatives of a foreign corporation, where the orders are sent to the foreign corporation for approval and acceptance (or rejection) in the foreign state, from which the goods are to be shipped to the purchaser in the former state, does not constitute doing business in such state; that service of process upon the traveling salesman in an action against the absent foreign corporation is insufficient to confer jurisdiction upon the Court over the foreign corporation; and that jurisdiction of a foreign corporation is not obtained by service upon one who has mere authority to sell goods of the corporation for shipment in interstate commerce at a specified price.

The foregoing was heretofore held to be the law notwithstanding a statute of the state providing for the service of process upon an "agent" of a foreign corporation "doing business" in the state for interstate commerce

rather than intrastate commerce is thus carried on, and a judgment rendered against the foreign corporation of which jurisdiction was obtained by such service would amount to a denial of due process of law under the Fourteenth Amendment of the United States Constitution. It was held also that to permit such service would be beyond the power of the state as a restriction upon interstate commerce and violation of Article I, Clause 3, of the Federal Constitution.

Nevertheless, the Court of Appeals, Fifth Circuit, has now held, in effect, that by the decisions in *International Shoe Co.* v. *Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.ed. 95, 161 A.L.R. 1057, and from its interpretation of the opinion in the *Polizzi* case, the Supreme Court has abolished and terminated the said former rules of decision and has established a substitute rule making the mere solicitation of business or the shipment of goods in commerce an act of doing intrastate commerce for purposes of jurisdiction and service of process.

Since the decision in the *Polizzi* case, the Fifth Circuit has abandoned its former rulings in *Employers Liability* v. *LeJeune,* 189 F.2d 521, *Rosenthal* v. *Frankfort Distillers,* 193 F. 2d 137, and *Pacific Employers* v. *Parry Navigation Co.,* 195 F. 2d 372, to the effect that "mere solicitation" of orders for interstate shipment of goods does not give the foreign corporation "presence" within the state for service of process, and now has adopted the contrary rule.

The present rule of the Fifth Circuit conflicts with the rule applied in the Second Circuit. There, in *De Santa* v. *Nehi Corporation,* (1948), 171 F. 2d 696; in *Echeverry* v. *Kellogg Switchboard & Supply Co.* (1949), 175 F. 2d 900; and *Schiller* v. *Met-Clip Co., Inc.,* (1950), 180 F. 2d 654, the "mere solicitation rule" was denied and rejected. The same is true with respect to *Partin* v. *Michaels Art Bronze Co.,* (1953), 3 Cir., 202 F. 2d 541.

Thus, conflicts exist between the Courts of Appeal of different circuits as to a highly important question, national in scope of interest and effect. Litigants of the entire country are uncertain as to their rights and relationships and the courts are uncertain and confused as to fundamental matters of service of process and jurisdiction. Clarification by the Highest Court is urgently required.

Further, the Court of Appeals should have granted the writs applied for to exert required appellate power over the District Court, as the writs were appropriate and would have afforded an expeditious and effective means of confining the District Court to a lawful exercise of its jurisdiction. *Ex parte Peru,* La. 1943, 318 U.S. 578, 63 S.Ct. 793, 87 L. ed. 1014.

Conclusion

The question as to whether "mere solicitation" of orders for goods for casual shipment in interstate commerce is "local" so as to confer jurisdiction and render the nonresident seller subject to Process, can be finally settled only in the Supreme Court of the United States.

For the reasons stated, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

T. J. Blackwell,
Counsel for Petitioner.

October 26, 1954.